property which she was competent to dispose at the time of the deceased's death. Hence, there was no property passing on her death to enable the second defendant to levy estate duty on the said property.

Accordingly, I allow this petition with costs.

ULU SELANGOR ESTATES SDN. BHD.

v.

NG KIM LENG (T/A SOON JOO & CO.)

HIGH COURT, KUALA LUMPUR
DATO' SITI NORMA YAAKOB J.
[SUIT NO. C2932 OF 1983]
10 MAY 1993

CONTRACT: Goods sold and delivered - Customs or usage - Payment on delivery - Independent evidence - Burden of proof on defendant - Admission of debt.

The plaintiff had been selling rubber to the defendant for a numbers of years. The plaintiff claimed against the defendant the sum of RM90,750.29, being the balance due.

The defendant does not deny purchasing rubber but disputed the amount claimed on the grounds that all monies due to the plaintiff had been settled in full on delivery.

Held:

[1] As customs or usage had been pleaded, it is incumbent upon the defendant to adduce independent evidence to prove the existence of such a usage or custom. A usage is not proved by merely bringing the person interested in establishing its existence to give oral evidence of its existence unsupported by any other evidence.

[2] All the invoices are written in Chinese and going through each voucher, what purports to be PW2's signature differs from voucher to voucher and in the face of such irreconcilable differences, it is incumbent upon the defendant to bring in other independent evidence to prove that the signatures on the invoices belong to PW2. In the absence of such evidence it can only be concluded that the defendant has failed to prove that PW2 had received part of the payment of the scrap rubber through the cash vouchers.

[Plaintiff's claim allowed with costs and interest].

Cases referred to:

Fielding & Platt Ltd. v. Najjar [1969] 1 WLR 358 ***(cit)***

Cebora v. SIP [1976] 1 LLR 271 ***(cit)***

For the plaintiff - S. Radhakrishnan; M/s. Shearn Delamore & Co.

For the defendant - S.S. Muker; M/s. Lovelace & Hastings

JUDGMENT

Siti Norma Yaakob J:

In this suit, the plaintiff seeks to recover RM490,750.29, being the balance due from the defendant in respect of sales of rubber made by the plaintiff to the defendant between the years 1979 to 1983.

The defendant does not deny such purchases but nonetheless disputes the amount claimed on the ground that all monies due to the plaintiff had been settled in full on delivery with payments effected in the following manner:

(1) By way of crossed cheques drawn in favour of the plaintiff.
(2) In the case of sheet rubber, by way of cash payments of RM2,000 and the balance by way of crossed cheques drawn in favour of the plaintiff.
(3) In the case of scrap rubber, all payments after 1981 were made by way of cash calculated at 20 cents per kati and the balance by way of crossed cheques drawn in favour of the plaintiff.

The first objection taken on this defence is that the evidence led by the defendant on the modes of payment had not been pleaded in the statement of defence, as paragraph 2 only avers to such payments on a cash on delivery basis. As such, the plaintiff maintains that the evidence led is inconsistent with the defence pleaded.

I do not see any merit to this objection, as a cheque being a bill of exchange is in law treated as cash. See the cases of *Fielding & Platt Ltd. v. Najjar* [1969] 1 WLR 358 and *Cebora v. SIP* [1976] 1 LLR 271. When the defendant avers that each consignment of rubber was paid on a cash on delivery basis, what is intended to convey is that there were no credit terms given for the purchases as all transactions were settled in cash. The modes of settlement, be they be payments in cash or by cheques, are particulars of how such cash transactions were conducted. That being the case, I see no inconsistency as to what has been pleaded and the evidence led to support the plea, as such evidence merely particularises the modes of the cash transactions conducted between the parties.

As the dispute is centred on the accounts of all transactions maintained by both the plaintiff and the defendant, evidence was led to compare and off-set the accounts kept by one party against the accounts kept by the other. For this purpose, the plaintiff relied on the evidence of PW1, the Accountant who audited the plaintiff's books of accounts, and PW2, the plaintiff's Secretary who was directly involved in the sales. On the defendant's part, in addition to his own evidence, he also relied on the evidence of DW2, his accounts clerk of many years, who was directly involved in the purchases of the rubber from PW2.

PW1 explained that in the course of his investigations into the plaintiff's books of accounts and ledgers, the defendant tendered:

(1) 264 photocopies of crossed cheques made in favour of the plaintiff. 130 of such cheques appear as AG 1-068.
(2) 58 photocopies of cash cheques, and
(3) 57 photocopies of cash vouchers which the defendant maintains represent the cash payments for the scrap rubber.

Out of the 264 crossed cheques tendered, PW1 discovered that 5 at AB 11-13 were made payable either to third parties or not in payment of the rubber purchased. 46 others had been duplicated and 30 more were in respect of transactions conducted in 1978 and therefore irrelevant for the purposes of his audit. Thus he considered only 183 crossed cheques which he matched and reconciled against individual transactions listed at AD 7-17. The total value of the 183 crossed cheques came to RM850,050.47 and he has given credit for this amount.

Out of 58 photocopies of cash cheques tendered, 10 at AB 14-20 were found to be irrelevant as they were issued in favour of various third parties or cleared by Banks who are not the plaintiff's bankers. The plaintiff maintained only one banking account with the Kwong Yik Bank in Kuala Lumpur.

Of the remaining 48 cash cheques at AG 183-211 amounting to RM86,154.92, they were cashed or cleared by the defendant's own Bankers, Overseas Chinese Banking Corporation Ltd., in Klang and cash was paid over the counter but PW1 was not able to identify to whom the cash was paid, neither was he able to find evidence of receipt of such cash by the plaintiff from the plaintiff's books of accounts. Hence he has discounted all 48 cash cheques.

From the 57 photocopies of cash vouchers tendered at AG 69-182, PW2 is alleged to have acknowledged receipt of the various amounts stated in each cash voucher but since PW2 has denied the signatures in those vouchers to be his and that the plaintiff's books do not record receipt of any cash, PW1 had not given credit for the sum of RM92,018.70 being the total amount of the 57 cash vouchers tendered.

By rejecting the 48 cash cheques and the 57 cash vouchers, PW1 confirmed that credit terms were given for each transaction.

The first objection taken on PW1's evidence is that it is not supported or corroborated by the evidence of the plaintiff's clerk, one Miss Low, the Estate Manager, one Mr. Chan, and the Estate Conductor to whom PW1 had turned to for assistance when he was auditing the plaintiff's books of accounts and ledgers. To that extent it is submitted that I should be very wary of his evidence.

To answer this objection, it must first be ascertained the nature of the assistance which PW1 had sought from the 3 absent employees of the plaintiff. The only evidence of this came from PW1 who testified that they only clarified matters over which he was not familiar with. That being the nature of the assistance, I do not consider that their evidence can throw any light as to whether the defendant's accounts with the plaintiff have been settled in full.

PW1 has also explained that he had started the audit with an opening balance of RM89,000 for 1979 in respect of transactions conducted in 1978 as set out in AE20-29. As this amount is nowhere reflected in AE20-29, the defendant questions the correctness of the plaintiff's accounts, particularly so when AE25 records the first outstanding amount to be RM1,834.44 in respect of a sale conducted on 17 February 1981.

It is true that the opening balance for 1979 does not appear at AE20-29. They only set out particulars of individual sales from 1979 - 1983 and at AE29, PW1 arrived at the total value of such sales during that period to be RM1,442,735.13 from which a balance of RM490,750.29 is still due and owing from the defendant.

Evidence of the opening balance for 1979 is to be found at AB31, where the defendant has confirmed that a balance sum of RM89,896.28 is due and owing from him as at 31 December, 1978. It is from that opening balance that PW1 proceeded to audit the plaintiff's accounts and since there is evidence as to the opening balance, I see no merits to the defendant's objection that the plaintiff's accounts are incorrect.

Every transaction between the parties is evidenced by the defendant's invoice, Form G, wherein particulars of the type of rubber purchased, its nett weight, its price per picul and the total amount due are stated and the invoice is signed by the defendant as confirmation of such purchase. Two of such invoices appear as AC75 & 76. The plaintiff would receive a copy of Form G after which the delivery of the rubber ordered would be effected and payment duly made. It is from these numerous Form Gs in the plaintiff's possession that PW1 was able to identify each sale and to reconcile it with the cheque or cheques tendered by the defendant as payment.

One of the objections taken by the defendant is that payments made in respect of sales in Form G 138 and 139 fall short of the total sum due on the two transactions as seen from AD7 and for that very reason I cannot rely on the plaintiff's account.

From AD7, it is clear that the total purchase price for Form G 138 and 139 came to RM15,683.95. The defendant issued 4 OCBC cheques in payment in the sums of RM6,317.92, RM945, RM1,928.33 and RM6,466.05. The total amount of the 4 cheques comes to RM15,657.30, which is RM26.65 less than the total costs of the 2 consignments. Because of this difference, the defendant not only questions the correctness of the plaintiff's accounts but also the fact that the pay-in slip for all the 4 cheques has not been identified.

It is true that the plaintiff had not identified the pay-in slip for the 4 cheques and it is also true that there is a short-fall of RM26.65 in respect of sales in Form G 138 and 139. However, what the defendant fails to realise is that despite the absence of the pay-in slip and the short-fall of RM26.65, the plaintiff

are prepared to accept the 4 cheques in full settlement of the rubber supplied pursuant to Form G 138 and 139 and have given credit to the defendant for such payments and have regarded the sales to be fully settled by the 4 cheques. As such, I see no reason for the defendant to complain at all.

I place the same considerations to the defendant's objection that PW1 had failed to account for 2 OCBC cheques Nos.U 109684 for RM98.43 and U 109975 for RM22.11 at AC166 and 173 respectively. These 2 cheques are the defendant's own cheques and they were paid into the plaintiff's account with Kwong Yik Bank Berhad and credited to the defendant's account with the plaintiff. Likewise, the Malayan Banking cheque No.161382 for RM1,172.10 at AC252. Although PW1 was not able to lay his hand on that particular cheque, nonetheless he was prepared to give credit for it as the plaintiff had banked in the cheque together with the defendant's other cheques and had taken it into account when reconciling payments for sales recorded in Form G 358 - 364 appearing at AC265 - 27;2. This is clear when the total sums paid in by the 3 pay-in slips at AC252, AC256 and AC261 correspond to the total value of the sales recorded in Form G 358 - 364 appearing at AC265 -272.

It must also be remembered that the defendant tendered photocopies of all cheques on a piecemeal basis since 1989 and this has resulted in PW1 preparing 2 sets of reports, the first being AB1-3 and AB8-23, while the second and final one is found at AD7-17.

In the first report, PW1 considered only 129 crossed cheques out of the 134 tendered by the defendant as the remaining 5 were made out either to other third parties or photocopied twice.

The second and final report became necessary when the defendant tendered another 130 photocopies of crossed cheques in October 1991, from which only 54 were found to be relevant, and in October 1992 in the course of this trial, the defendant forwarded additional cheques for the consideration of the plaintiff.

In the circumstances, PW1 was greatly hampered and handicapped to reconcile the defendant's cheques to specific transactions but nonetheless with all the evidence available, I see nothing objectionable or misleading to his final report appearing at AD7 - 17. In fact, in his "Summary" appearing at AD17, PW1 has given the defendant credit for RM942, 185.41, even though out of that sum only RM850,050.47 had been supported by the 183 crossed cheques, thereby leaving a balance of RM92,134.94 in unavailable cheques. Nevertheless, the plaintiffs' are prepared to credit that balance as well, as they had received total payments amounting to RM942,185.41 from the defendant for the period 1979 - 1983 and had banked that amount for the same period.

PW1's evidence is supported by PW2, the plaintiff's clerk of 46 years and the person directly involved in selling the rubber to the defendant. He dealt directly with DW2 the defendant's clerk who acted on behalf of the defendant. The sum total of PW2's evidence is that he only received crossed cheques in payment from DW2. There was no arrangement to meet payment partly by cheque and partly by cash. He denied,

(1) receiving any cash payment from DW2.
(2) signing or acknowledging receipt of cash payments on the cash vouchers at AG69-181.
(3) lending any money to DW2, and
(4) the signatures in AF59, AF62 and D1 were his.

The defendant, on the other hand, maintains that out of the total sales of RM1,413,549.63, he has paid the plaintiff RM1,374,375.80 which is made up of RM1,026,579.38 in crossed cheques, RM338,173.63 by way of cash cheques and cash vouchers and RM9,622.80 by way of bank drafts, thereby leaving a short-fall of RM39,173.83 for which he is prepared to pay the plaintiff, as he cannot reconcile the difference. Since the defendant himself had no personal knowledge of all the rubber purchased from the plaintiff as he left all such transactions entirely to his trusted clerk, DW2, I have to contend with the evidence of only DW2 to consider whether all the transactions had been settled in full. For this purpose, I shall first of all deal with the defendant's averments in his statement of defence and then consider the oral evidence of DW2.

I have already dealt with the plaintiff's objection to paragraph 2 of the statement of defence. In paragraph 3, there is an averment

that the plaintiff did not render any particulars of account to the defendant and that the accounts that were rendered did not reflect the course of dealings between the parties.

The evidence shows that the only statement of accounts rendered by the plaintiff to the defendant is the yearly confirmation statements sent by the plaintiff's Auditors, AB29-35. However, on 10 October, 1983, the plaintiff, through their solicitors, sent AB25, the letter of demand which attached the statement of accounts appearing at AB26-28 stating the opening balances outstanding from the years ending 1974 to 31 August 1983, the payments made during that period and the outstanding balance as at 31 August 1983. The defendant admitted that he received the letter and statement of accounts but he did not respond to it as one Mr. Wong Fen Kong, the plaintiff's own Auditor and a colleague of PW1, told him to ignore the accounts as he, Mr. Wong, was auditing the plaintiff's accounts. This statement cannot be correct, as it was PW1 and not Mr. Wong who actually audited the defendant's account with the plaintiff. The defendant did not call Mr. Wong to confirm that it was he who persuaded the defendant not to respond to the plaintiff's demand to pay. Since the defendant maintains all along that he owes no money to the plaintiff, the natural reaction to AB25-28 would have been to formally reply to AB25 by denying any indebtedness. This the defendant failed to do and the only logical reason why he failed to react to AB25 is that the defendant had no idea then in 1983 how the transactions were conducted by DW2. On his own admission, the plaintiff's file was missing, so too the Form Gs, and it was after he had received AB25 and confronted with the confirmation statements at AB29-35 signed by DW2 that he realised that DW2 had been dishonest and for the first time discovered that the accounts maintained by DW2 were irregular.

Thus the only plausible reason why the defendant did not respond to AB25 is not so much that Mr. Wong had instructed him to ignore it but that he had no idea of the status of his accounts and he was in no position to refute the plaintiff's demand.

The accounts as tendered by the plaintiff are a clear indication that credit was given for the purchases made by the defendant. To refute this, the defendant has pleaded at paragraph 4 of his Statement of Defence that the custom in the rubber trade is that as regards the purchase of scrap rubber, all such purchases were paid for in cash.

As custom or usage has been pleaded, it is incumbent upon the defendant to adduce independent evidence to prove the existence of such a usage or custom. A usage is not proved by merely bringing the person interested in establishing its existence to give oral evidence of its existence unsupported by any other evidence.

In this instance I have only the bare assertions of the defendant and DW2 of the existence of such a custom and since their evidence alone is not sufficient to prove custom, I consider that paragraph 4 of the Statement of Defence insofar as it relates to the plea of custom has not been sufficiently proved. What remains of the averment in paragraph 4 is the defendant's contention that the purchases of the scrap rubber were settled partly by the payment of cash calculated at the rate of 20 cents per kati and the balance by crossed cheques. In this respect, the plaintiff singles out an entry in D7, where the defendant has given particulars of all transactions relating to the purchase of scrap and sheet rubber for the relevant period. The particular entry relates to the purchase of 98 piculs and 34 katis of scrap rubber delivered on 28 August 1979, pursuant to Form G 274. The total purchase price is stated to be RM5,261.19 and settlement was made by one single payment of the defendant's OCBC crossed cheque No. 109915, AG001. There was no cash payment to represent the 20 cents per kati of the scrap rubber delivered and this has led the plaintiff to conclude that there is no truth to the defendant's assertion that payment for the scrap rubber was made partly by the tender of cash calculated at 20 cents per kati and the balance by crossed cheque.

The answer to this objection lies in the fact that the particular transaction as singled out by the plaintiff happened in 1979 and according to the defendant, the arrangement to pay partly by cash and partly by crossed cheque in respect of scrap rubber only took place for transactions conducted in 1982 as all payments for scrap rubber purchased up to 1981 had already been settled in full.

Turning to DW2, it is his evidence that for the purchase of the sheet rubber, he would pay PW2 cash of RM2,000 and the balance by a crossed cheque. For the cash payment, he admitted that he would have received the RM2,000 by cashing the defendant's cash cheque at the defendant's bankers in Klang and remitting the cash directly to PW2 together with the crossed cheque. It is also his evidence that PW2 would acknowledge receipt of the total payments on the defendant's invoice, Form G. As evidence of such receipts of payment, DW2 was only able to produce 3 Form Gs, D5A-C.

As I have stated earlier, D5A-C are the defendant's own documents which are issued once a sale has been agreed upon. On the face of each invoice, there is no acknowledgement of receipt of any money as it merely states the relevant particulars of the rubber to be purchased. It is true each invoice is signed by PW2 and DW2 but in the absence of any other evidence, such acknowledgements can also be attributed to the fact that a sale and purchase has been agreed upon but not necessarily concluded, as no payment is stated to have been made.

If indeed PW2's signatures on the Form Gs represent acknowledgements of receipt of the cash of RM2,000, PW2 must have signed thousands of such forms but the defendant was only able to produce three. Receipts of money can only be evidenced by a proper receipt and I consider that D5A-C standing alone are not conclusive evidence of receipts of money.

It is also DW2's evidence that for the scrap rubber, the 20 cents per kati cash payment is made and acknowledged by PW2 on the defendant's vouchers as seen from AG69-182. PW2 has denied that the signatures on the cash vouchers are his. All the invoices are written in Chinese and going through each voucher, I notice that what purports to be PW2's signatures differ from voucher to voucher and in the face of such irreconcilable differences, it is incumbent upon the defendant to bring in other independent evidence to prove that the signatures on the invoices belong to PW2. In the absence of such evidence, I can only conclude that the defendant has failed to prove that PW2 had received part of the payment of the scrap rubber through the cash vouchers. Independent evidence is very essential in this case as DW2 has admitted that all cash payments made were through cash cheques which he himself had cashed at the defendant's bank and he had then tendered the cash he had collected at the counter to PW2.

DW2 has also admitted that unknown to the defendant, he signed the confirmation statements, AB29-35, but he explains he was forced to do so, as he was obligated to PW2. That obligation stems from a loan which he had taken from PW2, which is denied by PW2. Apart from his bare assertion, no other particulars were given by DW2 when the loan was requested or given, the purpose of the loan and when it was repayable. Was it a friendly loan or one charged with interest? Was the lender the plaintiff or PW2 himself? None of these particulars are available, except for AF59 dated 15 September 1983, which DW2 states was executed by PW2 and the amount of RM48,219.50 stated therein represented the balance of the loan outstanding as at 31 July 1983. Even the amount of the loan has not been specified by DW2 apart from stating that it was RM25,000 or RM30,000. If that be so, the amount owing according to AF59 is far in excess of the amount lent and could that excess be interest chargeable? Evidence on this is not before me and since PW2 has denied issuing AF59 and it is captioned "Rubber Sales Account", I need more than DW2's bare assertion that the amount stated in AF59 is the balance of the alleged loan due from him.

Perhaps the most telling part of DW2's evidence is AF61, a letter dated 8 December 1983, which he had written to the plaintiff's Auditors containing proposals of how he would settle the defendant's account with the plaintiff. His willingness to sell his shares in 2 pieces of land and a house all add up to the conclusion that if there is any manipulation in the accounts that could only have been done by DW2. He had every opportunity to do so as he was solely entrusted by the defendant not only to purchase the rubber but also to pay for them. Cash cheques meant for the plaintiff were not paid directly to PW2 but instead cashed by him and he in turn tendered the cash to PW2. Attempts to adduce evidence of receipts of such cash by PW2 failed miserably as whatever evidence tendered do not conclusively prove that PW2 had received such cash. In the absence of such evidence in all probability DW2 must have misappropriated the cash meant for the plaintiff.

Unlike the plaintiff, the defendant's accounts as maintained and prepared by DW2 have not been audited. If this had been done, the defendant would have discovered that there are discrepancies in the accounts prepared by DW2. As examples, I refer to AF39 wherein DW2 has recorded the price of the rubber purchased pursuant to Form G 364 to be RM6,085.56. Form G 364 is AB52 for which DW2 has earlier acknowledged the purchase price to be RM6,436.65. Likewise AF46 gives the purchase price as RM3,715.60. The relevant Form G 405 at AB54 shows a different figure, RM4,399.42. Again AF51 states the total purchase price to be RM6,165. The corresponding Form G 438 which is AB58 indicates a total sum of RM6,658.20. I stress here again that Form G is the defendant's own document signed by DW2 and yet particulars of the same transaction maintained by DW2 in some other account book differs from the very invoice evidencing the purchase.

Unlike the plaintiff, the defendant had come out openly to declare that DW2 had been dishonest, had mismanaged the defendant's business, breached the trust entrusted to him and had maintained irregular accounts of all transactions with the plaintiff. It is for this reason that I cannot in the absence of conclusive evidence accept PW2's involvement of any fraudulent dealings spearheaded by DW2 and for that matter place much reliance to PW2's purported admission of guilt in his letter dated 10 December 1983, AF62, which PW2 denies have been signed by him. The defendant had also admitted that although AF62 is directed to the plaintiff, the plaintiff never received it as he had kept it in his safe.

On the evidence adduced, particularly on the admissions of indebtedness appearing at AB29-35, I find that the defendant had not succeeded in proving that his accounts with the plaintiff had been settled in full. On the contrary, there is still a balance owing out of the total sales of RM1,413,549.63 which has been agreed to by the parties. Since the plaintiff have acknowledged receiving only RM942,185.41 including the RM850,050.47 which is supported by the 183 crossed cheques, there will be judgment entered for the plaintiff for the sum of RM471,364.22, interest at 8% per annum from the date of filing of this suit to date of realisation, and costs.

YAP NYO NYOK @ YAP YOON JIN (F)

v.

BATH PHARMACY SDN. BHD.

HIGH COURT, KUCHING
DATUK CHONG SIEW FAI J.
[CIVIL APPEAL NO. KG. 27 OF 1991]
27 APRIL 1993

LANDLORD AND TENANT: Sublease - For a fixed term - Subsequent sale of property - Whether purchaser entitled to terminate sublease before expiry of full term - Whether notice to quit reasonable and good in law.

PRACTICE AND PROCEDURE: Pleadings - Statement of claim - Plaintiff relying on implied term - Facts relating to implied term not pleaded - No evidence adduced on the implied term - Whether plaintiff entitled to raise the issue in his submission.

The defendant and the administratrix of the estate of the deceased owner of the property entered into a agreement whereby the property was sublet to the defendant for a fixed term of 10 years commencing 16 August 1988. The administratrix subsequently sold the property to the plaintiff who took it with notice of the sublease. The plaintiff served a three month notice to quit on the defendant and claimed for possession of the property and for damages for alleged trespass.

The plaintiff appealed against the decision of the trial Magistrate answering the following points of law in the negative:

(a) whether the plaintiff is entitled to prematurely terminate the sublease before its term has fully expired relying upon the provisions of clause 4 of the agreement; and
(b) whether the notice to quit dated 27 December 1989 served by the plaintiff on the defendant is reasonable and good in law.

Held:

[1] Where a plaintiff's claim rests on an implied term, as in the instant case, the proper practice is to allege such implied term or agreement as a fact, setting out the basis upon which the implied term is said to have arisen. All facts that are essential to constitute a cause of action must be alleged. The plaintiff had not pleaded material facts necessary to support his claim for possession and